LIM THIAN KIAT

v.

TERESA HAESOOK LIM NEE TERESA HAESOOK DEAN & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
JAMES FOONG J
[DIVORCE PETITION NO: S5-33-477-1997]
20 DECEMBER 1997

FAMILY LAW: *Separation - Deed - Whether valid and subsisting - Whether court had jurisdiction to express opinion as to its reasonableness - Law Reform (Marriage and Divorce) Act 1976 ('the Act'), s. 56 - Whether Rules of the High Court 1980 or other legislation excluded from the Act*

FAMILY LAW: *Separation - Collateral agreement - Whether there was collateral agreement - Whether respondent was induced to sign separation deed because of collateral agreement*

WORDS & PHRASES: *"Provision may be made by the rules of court" - Section 56 of the Law Reform (Marriage and Divorce) Act 1976*

The petitioner filed a divorce petition against the respondent, who responded with a cross petition for divorce. The petitioner subsequently filed a summons to restrain the respondent from molesting, harassing, pestering or disturbing him and his children, while the respondent filed a summons requesting for maintenance pending suit and child support. There was a further application filed on behalf of the petitioner for the court to determine under s. 56 of the Law Reform (Marriage and Divorce) Act 1976 ('the Act'), the subsistence and validity of the Deed of Separation ('the deed') that was entered into between the petitioner and the respondent. The respondent challenged the existence of any rules of the court having been promulgated to enable such agreement to be referred to the court and contended that as the rules were yet to be made under the Divorce and Matrimonial Proceeding Rules 1980 ('the Rules') to accomodate s. 56 of the Act, it could not be relied upon to institute the petitioner's application. The respondent further submitted that there was a collateral agreement, apart from the deed, in which the petitioner had agreed to pay the respondent more than what was stipulated in the deed. The issues before the court were: (i) whether the deed was valid; (ii) whether the terms of maintenance as stated in the deed could be varied; and (iii) whether there existed a collateral agreement.

Held:

[1] Pursuant to s. 56 of the Act, the phrase, 'provision may be made by rules of court' is not confined only to the rules and regulations as set out in the Divorce and Matrimonial Proceedings Rules 1980 ('the Rules'). The 'rules of court' must include the principle enactment ie Rules of the High Court 1980 ('RHC'), which governs all proceedings brought in the High Court, unless otherwise provided. There is no exclusion of the RHC in the Rules or other legislation relating to divorce proceedings within the jurisdiction of this court. For this, the reference to 'provision may be made by the rules of court' must include those provided in the RHC if they are not disclosed in the Rules.

[2] The RHC, O. 33 r. 2 renders sufficient jurisdiction to enable the parties in a matrimonial dispute to refer to the court any agreement or arrangement they have entered for consideration as provided under s. 56 of the Act. Thus the court had sufficient authority to entertain the application of the petitioner on the validity of the deed.

[3] The deed was a perfectly valid agreement between two parties where the terms were arrived at voluntarily, with the advantage of the respondent possessing adequate legal advice. The terms were performed by the petitioner, and the court would not accept the sudden recent change of heart by the respondent in attempting to vary the terms of the agreement on matrimonial assets.

[4] An oral promise, given at the time of contracting which induces a party into the contract, overrides any inconsistent written agreement. That device of collateral agreement does not offend the extrinsic evidence rule because oral promise is not imported into the main agreement. Instead it constitutes a separate contract which exists side by side with the main agreement. The documentary evidence in the present case did not reflect that the collateral agreement was made at the time of the deed to induce the respondent to enter into the contract. Failure to fulfill that fundamental condition disabled the application of the principle of collateral agreement.

[5] The deed was valid and binding on the parties, and the court would approve the terms in the deed upon the granting of decree nisi relating to provisions governing the division of matrimonial assets. As for the provisions concerning the maintenance of the respondent and the children, they would be subjected to variation by the court as provided for under ss. 80, 84 and 97 of the Act.

[Petitioner's application allowed; costs in the cause.]

Cases referred to:
Alghussein Establishment v. Eton College [1988] 1 WLR 587 ***(refd)***
Clark v. Clarke [1885] 10 PD 188 ***(refd)***
Edgar v. Edgar [1980] 3 All ER 887 ***(refd)***
Tan Swee Hoe Co Ltd v. Ali Hussain Bros [1980] 2 MLJ 16 ***(refd)***

Legislation referred to:
Law Reform (Marriage and Divorce) Act 1976, ss. 52, 56, 58, 76, 80, 84, 97
Rules of the High Court 1980, O. 33 r. 2
Evidence Act 1950, ss. 91, 92

For the petitioner - Balwant Singh Sidhu (PS Gill with him); M/s Gill & Tang
For the respondent - Liew Chun Wah (MS Murthi); M/s Murthi & Partners

Reported by Michele Saw

JUDGMENT

James Foong J:

The petitioner has filed a divorce petition against his wife, the respondent. This is encl. 1. The wife answered with a cross petition for divorce, and claims:

(a) half of the petitioner's assets acquired during the marriage;

(b) US$100,000 per month tax free for her life until she remarries;

(c) guardianship, custody and control of the 3 children of the marriage;

(d) maintenance for the children at US$50,000 per month with 5% annual increment;

(e) a trust fund to be set up by the petitioner for children at US$100 million for each child.

(f) extra tuition fees, medical fees and any incidental fees pertaining to the education of the children.

A party cited was also named and against her, she (the wife) claims damages of US$500 million, and be condemned in costs.

The pleadings closed with the petitioner tendering a reply and answer to cross-petition together with an answer of the party cited. Subsequent to the filing of directions for trial, this court fixed the hearing of this petition and cross-petition on 5 December 1997.

While awaiting trial, on 5 September 1997 the petitioner filed a summons-in-chambers to restrain the respondent from molesting, harassing, pestering or disturbing him and his children. This is in encl. 11. The return date for this application was 4 December 1997.

Not long thereafter, on 27 November 1997 the respondent by way of summons-in-chambers requested from this court:

(a) maintenance pending suit of US$100,000 per month from November 1993; and

(b) child support of US$40,000 per month for the 3 children with immediate effect. This application is encl. 21. The return date for the summons-in-chambers was 4 December 1997.

On 4 December 1997, the date fixed for hearing of encl. 11 and 21, the parties attempted to settle the matters. Unfortunately it failed. Due to time constraints, ordered that encl. 11 and 21 be heard on the following day, 5 December 1997, together with the petition and cross-petition.

On the morning of 5 December 1997, Mr. Balwant Singh Sidhu, counsel for the petitioner and party cited informed this court that he had just filed an application on behalf of the petitioner for the following orders:

(i) that the following question or issue arising in this cause be tried before the trial of the cause and that is: "whether the Deed of Separation entered into between the parties on 4th February 1991 is valid in law, and subsist"; and

(ii) such further or other orders of directions as to the manner in which the said question or issue shall be stated.

This application is encl. 24 and the return date was 5 December 1997.

Miss Liew, counsel for the respondent, graciously agreed to have this application heard on 5 December 1997 itself, though it was just served on her client. She requested that the affidavits filed by both parties in respect of encl. 11 and 21 be used to base her arguments. This was accepted by this court with the consent of Mr. Balwant Singh Sidhu. With this, I proceeded to hear submissions relating to encl. 34 which should be decided before the petition and cross-petition are heard.

The subject matter in encl. 24 concerns a deed of separation entered into between the petitioner and the respondent on 14 February 1991. It, *inter alia* spells out the following terms.

(a) the parties due to unhappy differences agreed mutually to live separate and apart from each other;

(b) the respondent accepts the settlement of US$500,000 in full and final settlement of her separation, and "subject to the performance of this Deed by the husband (petitioner), the said settlement shall be deemed full and final settlement of all claims of matrimonial assets against the Husband in the event of a divorce";

(c) the petitioner shall pay to the respondent a sum US$5,000 per month tax free as her maintenance from the date of this deed with 5% per provision for inflation for her life or until she remarries;

(d) the petitioner shall pay respondent a sum of US$8,334 per month tax free being child support for the 3 children from the date of this deed with 5% per annum provision for inflation.

(e) the petitioner to pay US$20,000 tax free twice annually as travelling expenses to the respondent and the children together with 1st class airfares and hotel bills for 4 persons. Again there is a 5% per annum provision for inflation;

(f) that in the event that the respondent chooses to live abroad, the petitioner shall purchase a 4-door new Mercedes Benz not exceeding US$50,000 for the respondent and the children;

(g) the respondent covenants not to pledge the credit of the petitioner from the date of this deed;

(h) the respondent shall not directly or indirectly harass, annoy or in any way interfere with the petitioner in all respects;

(i) the custody, care, control and guardianship of the 3 children be committed to the respondent with reasonable access to the petitioner;

(j) the petitioner shall within 6 months from date of this deed create a trust fund for each of the children by making cash deposits with a reputable bank and appointing bank as trustees to oversee this trust fund;

(k) upon performance of all these conditions of this deed, the parties agree that "they shall file a joint petition by consent under s. 52 of the Law Reform (Marriage and Divorce) Act 1976 should anyone spouse demands for a divorce.

According to Mr. Balwant Singh Sidhu, s. 56 Law Reform (Marriage And Divorce) Act 1976 (the Act) provides for such agreement or arrangement to be referred to the court to express an opinion as to the reasonableness of the agreement or arrangement, and to give such directions, if any, in the matter as it thinks fit. It is on this provision that this application (encl. 24) is based.

Miss Liew, though accepting that there was this deed of separation, firstly challenged the existence of any rules of court having been promulgated to enable such agreement or arrangement to be referred to the court for its comment. She contended that as rules are yet to be made under the Divorce and Matrimonial Proceeding Rules 1980 to accomodate this provision, s. 56 cannot be relied upon to institute this application.

To facilitate greater understanding and appreciation of her argument, I reproduce below the entire s. 56 of the Act:

> *Provisions may be made by rules* of *court* for enabling the parties to a marriage, or either of then, on application made either before or after the presentation of a petition for divorce, to refer to the court any agreement or arrangement made or proposed to be made between them, being an agreement or arrangement which relates to, arises out of, or is connected with, the proceedings for divorce which are contemplated or, as the case may be, have begun, and for enabling the court to express an opinion, should it think it desirable to do so, as to the reasonableness of the agreement or arrangement to give such directions, if any, in the matter as it thinks fit.

I am not in agreement with Miss Liew's contention. I am of the view that this prearrangement of the "provision may be made by rules of court" is not confined only to the rules and regulations as set out in the Divorce and Matrimonial Proceedings Rules 1980. The "ruler of court" must surely include the principle enactment – Rules of the High Court 1980 'RHC), which governs all proceedings brought in the High Court, unless otherwise provided. There is no exclusion of the RHC in the said Act or other legislation relating to divorce proceedings within the jurisdiction of this court. For this, the reference to the *"provision may be made by the rules of court"* must include those provided in the RHC if they are not disclosed in the Divorce and Matrimonial Proceedings Rules 1980.

In the RHC, O. 33 r. 2 RHC provides:

> The Court may order any question or issue arising in a cause or matter, whether of fact or law or partly of fact and partly of law, and whether raised by pleadings or otherwise, to be tried before, at or after the trial of the cause or matter, and may give directions as to the manner in which the question or issue shall be stated

This rule should render sufficient jurisdiction to enable the parties in a matrimonial dispute to refer to the court any agreement or arrangement they have entered for consideration as provided under s. 58 of the Act. Armed with this, this court shall have sufficient authority to entertain this application.

Section 80 Of The Act – Approval By The Court

The next argument raised is that such agreement (the deed of separation) is not effective until it has been approved by the court. To support this contention, s. 80 of the Act was highlighted. For convenience, I reproduced s. 80.

> 80. Compounding of maintenance
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> An agreement for the payment, in money or other property, of a capital sum in settlement of all future claim's to maintenance, shall not be effective until it has been approved, or approved subject to conditions, by the court, but when so approved shall be a good defence to any claim for maintenance.

There are certain terms in this deed of separation which relate to the maintenance of the respondent. For this, it requires the approval of the court. But is it not prayer (iv) of the petition for divorce (encl.1) that the petitioner is seeking this court's approval of this deed of separation. This court has yet to grant its approval, but for the purpose of s. 56 of the Act, an opinion can be expressed to the reasonableness of this agreement. Under these circumstances, I fail to understand why this matter is taken as an issue.

Rescission Of The Deed Of Separation

The next claim of the respondent is with more substance. She insisted that the deed of separation had been rescinded by her solicitors on 12 September 1991, in writing (the letter of rescission). This, she alleged was caused by the petitioner's breach of cll. 1(v) and 3(ii) of the deed of separation.

The petitioner vehemently denied this and asserted that the respondent cannot unilaterally rescind a contract when there was no major wrong committed by him. In addition, the petitioner also claimed that the respondent, by her action was estopped from terminating this agreement.

Clause 1(v) Of The Deed Of Separation

Clause 1(v) of the deed of separation requires the payment by the petitioner of a sum of US$20,000 annually as travelling expenses to the respondent and the children together with 4 first class tickets and hotel bills. This clause however does not spell out the mode and time for payment. In the letter of rescission, the respondent is claiming for a refund by stating that she "has

yet to receive the refund." To my mind, this reveals an arrangement between the parties whereby the respondent will expend on the holiday expenses first and then claim for disbursement subsequently.

The continued credit facilities extended to the respondent by the petitioner on the credit cards seen to support this arrangement. Documentary evidence also revealed that the petitioner had made disbursements on such claims to the respondents. When such was the mode of arrangement at that material time, I do not find that the petitioner had cl. 1(v) of the deed of separation.

Clause 3(11) Of The Deed Of Separation - Trust Fund For The Children

Clause 3(ii) the deed of separation of provides: for the creation of a trust fund by the petitioner within 6 months from the deed of separation for each of the children by making cash deposits with a reputable bank, and appointing the bank as trustee to oversee the trust fund.

Perusing a "Management Agreement" (p. 27 of encl. 37) dated 8 August 1991 entered into between the petitioner and the respondent on the part with LIMG, Management and Verwaltungs-Aktiengesellschaft, Vaduz on the other part as trustee, the mechanics for the creation of the children's trust fund had been set in motion. The question that follows is: Whether any fund were paid to the appointed trustee? The petitioner insisted that he had given to the respondent a sum of US$4 million on 3 July 1991 for onward transmission to the trust fund. To this, the respondent had been, and still is, evasive of this claim. But one piece of documentary evidence, the confirmation by a Swiss Bank (p. 1 of encl. 27) of this payment made to the respondent is inescapable. Judging by the dates of the appointment of trustees and the payment of this US$4 million to the respondent, of which the respondent has not denied receiving for any other purposes, the obligations of the petitioner under cl. 3(ii) of the deed of separation had been fulfilled, and within the period as stipulated thereunder. This gave no reasonable cause to the respondent to rescind the agreement under this particular provision.

Delay In Payment Of Maintenance

There was also, in the letter of rescission, a complaint by the respondent of two months arrears in maintenance payment. But this was never used as a ground to rescind the deed of separation. Item 5 in para. 3 of the letter of rescission specifically identifies cl. 3(ii) and cl. 1(v) as the grounds for rescission. Since this allegation of delay in the tendering of two regular monthly maintenance was not made the basis for the rescission, the respondent cannot rely on this alleged breach to claim lawful rescission of the deed of separation.

In any event, even if this was one of the grounds to justify the respondent's claim for rescission, I find that the respondent is estopped from doing so. Subsequent to her complaint on this matter, the two months arrears of maintenance was settled by the petitioner. Thereafter the respondent continued to accept the monthly maintenance payments for herself and the children, right up to the present day. Substantial parts (from September 1993 to November 1997) of such maintenance payments are displayed at pp. 2 & 3 or encl. 27. From the particulars of these documents, I noticed that the agreed maintenance was paid for every month. The total amount was no less than US$20,000 per month. This far exceeds what the petitioner was obligated to pay under the deed of separation. In view of such circumstances, the respondent is estopped from claiming that the petitioner had failed to fulfill his obligation to pay his month maintenance, a rid use this as a basis to rescind the deed of separation – see the case of *Clark v. Clarke* [1885] 10 PD 188.

Still on the issue of the alleged arrears of 2 monthly maintenance, the petitioner had explained that he refused pay because of: (a) harassment, annoyance and interference by the respondent; and (b) respondent's failure to acknowledge receipt of the money given to her for the trust fund. On first reason, there was in fact an admission by the respondent, through her solicitors, of an intrusion by the respondent into the office of the petitioner when he was holding a business meeting. This act of the respondent contravenes cl. 2(ii) of the deed of separation where respondent covenanted not to "directly or indirectly harass, annoy or in any way interface with the husband in all respect." For the second, as I have stated earlier, there is, to date, no acknowledgment of the sum of US4 million given to the respondent for the children's trust fund. For such wrongs, one of which being a term of the deed of separation, the respondent cannot be permitted to take advantage of her own wrong against the petitioner to rescind the agreement – see the case of *Alghussein Establishment v. Eton College* [1988] 1 WLR 587.

Finding on whether the rescission was justified

By the reasons stated above, I am of the opinion that the purported rescission of the deed of separation is unlawful and ineffective. The agreement remains subsisting.

Section 84 And 97 Of The Act

The next issue highlights the effects of this deed of separation to s. 84 and 97 of the Act. In Mr. Sidhu's submission, he insisted that by the wording of these two sections the court has only power to vary any agreement entered into between the parties in respect of maintenance; no such authority is extended to agreements or arrangements on the division of matrimonial assets.

Miss Liew, however disagreed. She was of the opinion that s. 84 and 97 of the Act are sufficiently extensive to include court's domination, which includes variation, on any agreement and arrangement reached by the parties.

To fully understand the significance of these two sections I append below their exact wording.

84. Power for court to vary agreement for maintenance

Subject to s. 80, the court may at any time and from time to time vary the terms of any agreement as to maintenance made between husband and wife, whether made before or after the appointed date, where it is satisfied that there has been any material change in the circumstances and notwithstanding any provision to the contrary in any such agreement.

97. Power for court to vary agreement for custody or maintenance

The court may at any time and from time to time vary the terms of any agreement relating to the custody or maintenance of a child, whether made before or after the appointed date, notwithstanding any provision to the contrary in any such agreement, where it is satisfied that it is reasonable and for the welfare of the child so to do.

From careful perusal of s. 84 and 97 of the Act, I find that the subject matter referred to in these 2 sections deals exclusively with maintenance, both for the spouses and the children. It does not include the division of matrimonial assets, which has an entire provision of its own under s. 76 the Act. Neither under this section (s. 76) nor in pursuant to any other general sections of the Act is prerogative granted to the court to vary such agreement or arrangement in respect of decision of matrimonial assets. Even s. 80 of the Act comes under the part that governs maintenance of spouses and refers only to "maintenance" and not to provision of matrimonial assets. Bearing this in mind, I shall now proceed to analyse the deed of separation.

This deed of separation essentially covers 5 basic matters. The first relates to the parties agreeing to live apart and they both covenant not to interfere with each other. The second concerns the monthly maintenance of the respondent and the children which includes the creation of trust funds and arrangement of holiday expenses. Under this category should be the availability of transportation and accommodation for respondent and the children. The third involves matrimonial assets. The fourth covers the cessation by the respondent in pledging the husband's credit with third parties. Finally, there is the provision for the filing of a joint petition for divorce under s. 52 of the Act upon performance of all the conditions of the agreement.

It is my opinion that each of the first 4 items listed above are separable. They can, on their own, stand distinct and separate from the other. Only the last item requires the fulfillment of all the first four. By this, I am of the *view* that only the second matter concerning maintenance is subjected to be varied by the court. As for the other three, the court has generally no jurisdiction to vary them as they were voluntarily agreed upon by the parties.

However, there exists in this deed of separation a cl. (v). The parties have agreed to: "This deed is always subject to the approval of the court upon divorce." By virtue of this specific provision, though there is no necessity for the court's approval on the agreed provision for division of matrimonial assets, the entire agreement, with all its terms, revetts back to the court's jurisdiction for sanction.

The item of major contention here is, of course, concentrated on the division of matrimonial assets. By the nature of the cross-petition and the assertion that the petitioner is a billionaire, naturally the respondent would wish to secure for herself a substantial portion of his assets. But the respondent under cl. 2(iii) of the deed of separation had accepted US$500,000 as "full and final settlement of all her claims of matrimonial assets against the husband (petitioner) in the event of a divorce." What then is the effect of this to the current petition for divorce, where the respondent has obviously changed her mind by claiming half of what the petitioner has? In my view, the principles enunciated by Ormrod LJ In *Edgar v. Edgar* [1980] 3 All ER 887 at 893 should be applicable. It is as follows:

> To decide what weight should be given, in order to reach just result, to a prior agreement ... regard must be had to the conduct of both parties leading up to the prior agreement and to their subsequent conduct in consequence of it. It is not necessary in this connection to think in formal legal terms, such as misrepresentation and estoppel; all circumstances as they affect each of two human beings must be considered in the complex relationship of marriage. So the circumstances surrounding the making of the agreement are relevant. Undue pressure by one side, exploitation of a dominant position to secure an unreasonable advantage, inadequate knowledge, possibly bad legal advice, an important change of circumstances, unforeseen or overlooked at the time of making the agreement, are all relevant to the question of justice between the parties. Important too is the general proposition that, formal agreements, properly and fairly arrived at with competent legal advice, should not be displaced unless there are good and substantial grounds for concluding that an injustice will be done by holding the parties to the terms of the agreement. There may be other considerations which affect the justice of this case, the above list is not intended to be an exclusive catalogue.

Applying the factors expounded above, I come up with the following observations:

(1) The deed of separation was, from correspondence tendered, instigated by the respondent.

(2) At all material times prior to the deed of separation the respondent was represented by solicitors, one of whom, Miss Liew, continues to act as her counsel even at this trial.

(3) The petitioner on the other hand had no solicitors on record. According to the averments in his affidavits, he accepted the terms in the deed of separation as drafted by the respondent's solicitors.

(4) No evidence of undue pressure seems to be applied on the respondent to agree to the terms contained in the deed. The parties wanted to stay apart to relieve their tumultuous relationship with an option for both to file for divorce by consent at a subsequent date.

(5) Necessary financial provisions were made to accommodate the respondent and the children. This obviously justifies and corresponds with the economic and financial position of the parties at that time.

(6) The sum of US$500,000 was paid and acknowledgement of receipt of this was given in writing by the respondent.

(7) The petitioner had fulfilled his part of the obligation under the agreement which was freely entered into by both parties.

With these assessments, I will be minded to adopt the terms relating to distribution of matrimonial assets stated in this deed of separation. It is a perfectly valid agreement between two parties where the terms were arrived at voluntarily, with the advantage of the respondent possessing adequate legal advice. These terms were performed by the petitioner, and I do not accept the sudden recent change of heart by the respondent in attempting to vary the terms of the agreement on matrimonial assets, when she had for the last 7 years, quite comfortably and without much complaint, accepted and lived by the terms stated in the deed of separation. As for maintenance, for both herself and the children, it will be subjected to review by this court upon consideration of all evidence available.

Collateral Agreement

Mr. Murthi, the respondent's co-counsel, submitted that there was a collateral agreement between the parties existing with the deed of separation. On this, the respondent claimed that the petitioner had agreed to pay her more than what is stipulated in the deed of separation.

To substantiate this assertion of the existence of a collateral agreement, the respondent referred to some correspondence between the parties where various offers were alleged as having been made by the petitioner to the respondent to pay the latter a lump sum settlement. Some of these correspondence include unsigned draft agreements. As authority to support this proposition of the validity and enforceability of a collateral agreement the case of *Tan Swee Hoe Co Ltd v. All Hussain Bros* [1980] 2 MLJ 16 was cited.

After careful perusal of this authority, I am of the view that the respondent is attempting to introduce extrinsic evidence to vary or contradict the terms of the written deed of separation. The primary objective is: obviously to vary cl. 2(iii) of the deed of separation concerning the full and final settlement of the respondent's claim of matrimonial assets. As no parol evidence is admissible under s. 91 and 92 of the Evidence Act, this principle of collateral agreement introduced by the common law is now intended to circumvent this statutory provision. However, before one can-consider the implication of this claim to the facts of the present case, it is relevant and necessary to determine the exact scope of this legal principle.

In my opinion the following passage of Raja Azlan Shah CJ Malaya (as he then was) in *Tan Swee Hoe Co Ltd v. All Hussain Bros* (supra) best expresses and elaborates this point:

> In our view those cases are strong authority for the proposition that an oral promise, *given at the time of contracting which induces a party to enter into the contract,* overrides any inconsistent written agreement. This device of collateral agreement does not offend the extrinsic evidence rule because oral promise is not imported into the main agreement. Instead it constitute a separate contract which exists side by side with the main agreement. (Emphasis added).

When this proposition was canvassed, this court enquired from the respondent's counsel as to what amount was agreed upon in this purported collateral agreement. The response was rather surprising; no amount was determined.

On reading the affidavit of the respondent (encl. 26), and the documents relied upon by the respondent to support this contention of the existence of a collateral-agreement, I discovered that they refer to dates well after the deed of separation. They range from 1993 to 1995.

These revelations cast doubts in the mind of this court as to whether there was genuinely such a promise made by the petitioner to pay a greater sum than what is stated deed of separation. Even if there were any such promises given, the documentary evidence does not reflect that it was made at the time of the deed of separation to induce the respondent to enter into this contract. Failure to fulfill this fundamental condition disables the application of this

principle of collateral agreement. I find that the respondent had entered to the deed of separation well advised, fully aware of the terms therein, and with her eyes wide open. This allegation of a collateral agreement is probably an afterthought designed to overcome the bargain she had struck freely and voluntarily with petitioner in 1991.

Opinion

From all that I have stated above, I now summarise my opinion as:

(1) the deed of separation is valid and binding on the parties;

(2) this court intends to approve the terms in this deed of separation upon the granting relating to provisions governing the division of matrimonial assets under c. 2(iii).

(3) As for the provision in the deed of separation concerning maintenance of the respondent and the children they are subject to variation by this court as provided for under s. 80, 84 and 97 of the Act.

Cost of this application shall be costs in cause.